

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

AUG 04 2009

HAROLD S. MARENUS, CLERK U.S. BKCY. APP. PANEL OF THE NINTH CIRCUIT

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In re:

HAIDEE JOY,

SCHWARZ PUBLISHING, INC.,

GERALD H. DAVIS, Chapter 7
Trustee; SCHWARZ PUBLISHING,

Debtor.

Appellant,

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INC.,

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Appellees.)

Submitted Without Oral Argument on July 10, 2009²

BAP No. SC-09-1032-PaRMo

Bk. No. 07-02122

MEMORANDUM¹

Filed - August 4, 2009

Appeal from the United States Bankruptcy Court for the Southern District of California

Honorable Laura S. Taylor, Bankruptcy Judge, Presiding

This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² In an order entered on July 7, 2009, the Panel determined that this matter was suitable for disposition without oral argument. Fed. R. Bankr. P. 8012; 9th Cir. BAP R. 8012-1.

Before: PAPPAS, RIEGLE³ and MONTALI, Bankruptcy Judges.

Creditor Haidee Joy ("Joy") appeals the bankruptcy court's Order Granting Trustee's Settlement With Michael Schwarz and Abandonment of Records. We AFFIRM.4

Debtor Schwarz Publishing, Inc. ("Schwarz Pub.") published the <u>San Diego Jewish Times</u>, at which Joy worked.⁵ On April 30, 2007, Schwarz Pub. filed a chapter 7⁶ bankruptcy petition, and as required, filed its Statement of Financial Affairs. In answer to Question No. 3, the statement listed three separate payments made to Michael J. Schwarz ("Mr. Schwarz"), the President of Schwarz

FACTS

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Pub., within one year of the bankruptcy filing, totaling

³ The Honorable Linda B. Riegle, United States Bankruptcy Judge for the District of Nevada, sitting by designation.

In so doing, we note that we have considered each of Joy's pleadings. She filed several briefs captioned "continuation" briefs, and contended that those briefs were not additional briefs, which would be unauthorized under Rules 8009 and 8010, but were merely continuations of properly filed briefs. While the rules do not allow for "continuation" briefs, because Joy appears pro se, we have exercised our discretion and construed her papers liberally. Ozenne v. Bendon (In re Ozenne), 337 B.R. 214, 218 (9th Cir. BAP 2006).

 $^{^5}$ Joy argues that she was an employee at the <u>San Diego</u> <u>Jewish Times</u> rather than an independent contractor as the schedules provide. However, her precise employment status is not factually relevant to the issues she raises on appeal.

⁶ Unless specified otherwise, all references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

\$17,500.7 Additionally, in response to Question No. 23, which concerns withdrawals from a partnership or distributions by a corporation, Schwarz Pub. again listed the three payments to Mr. Schwarz, and noted the purpose of the distribution to him was "[r]epayment of monies loaned for corporate expenses—in lieu of compensation." This gave rise to a potential preference action under § 547 to recover the \$17,500 paid to Mr. Schwarz.

On September 3, 2008, chapter 7 trustee Gerald H. Davis ("Trustee") filed a Trustee's Notice of Proposed Abandonment of Property. In this document, Trustee proposed to abandon "all books and records of the Debtor" on the grounds that there "is little or no equity in the property for the estate." Id. On September 8, 2008, Trustee filed a notice of his intention to settle the potential preference claim against Mr. Schwarz.

On October 6, 2008, Joy objected to the proposed settlement as well as the intention to abandon Schwarz Pub.'s business records, and requested a hearing. The matter was briefed, and on November 13, 2008, the bankruptcy court held a hearing on the proposed settlement and abandonment and the objection thereto. The Minute Order from the bankruptcy court reflects that both the settlement of the proposed preference action and the abandonment of business records were approved.

⁷ The payments were made on October 27, 2006, November 28, 2006 and February 23, 2007.

This document was not included in the excerpts of record; however, this Panel may exercise its discretion to consider pleadings appearing on the docket in the underlying bankruptcy case. FED. R. EVID. 201; O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989).

Joy filed this timely appeal from the bankruptcy court's Minute Order on November 20, 2008. A final order granting Trustee's proposed settlement with Michael Schwarz and abandonment of the business records was entered on December 10, 2008.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. \$\$ 1334 and 157(b)(2)(F). We have jurisdiction pursuant to 28 U.S.C. \$ 158.

ISSUES

- 1. Whether the bankruptcy court abused its discretion in granting Trustee's Settlement of a potential preference action with Mr. Schwarz.
- 2. Whether the bankruptcy court abused its discretion in granting Trustee's motion to abandon Schwarz Pub.'s business records.

STANDARDS OF REVIEW

The bankruptcy court's factual findings are reviewed for clear error, and its conclusions of law are reviewed de novo.

Rule 8013; Educ. Credit Mgmt. Corp. v. Coleman (In re Coleman),
560 F.3d 1000, 1003 (9th Cir. 2009).

We review a bankruptcy court's decision to approve a compromise for an abuse of discretion. Martin v. Kane (In re A&C Props.), 784 F.2d 1377, 1380 (9th Cir. 1986). A court's decision

to authorize or deny abandonment under § 554 is reviewed for abuse of discretion. <u>Johnston v. Webster (In re Johnston)</u>, 49 F.3d 538, 540 (9th Cir. 1995).

"Under the abuse of discretion standard, we will not reverse the bankruptcy court unless we have a definite and firm conviction that it made a clear error in judgment." In re

Brooks-Hamilton, 400 B.R. 238, 245 (9th Cir. BAP 2009) (citing Valley Eng'rs Inc. v. Elec. Eng'g Co., 158 F.3d 1051, 1057 (9th Cir. 1998)). "A court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." Ho v. Dowell (In re Ho), 274 B.R. 867, 871 (9th Cir. BAP 2002) (citing United States v. Spraque, 135 F.3d 1301, 1304 (9th Cir. 1998)).

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DISCUSSION

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Settlement of Potential Preference Action

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A brief word about preferences in bankruptcy. Joy has argued, both before the bankruptcy court and in her appellate briefs, that payment of the \$17,500 must have been illegal if the Trustee was able to go after it and get it back. This is not the case. It is a central policy of the Bankruptcy Code that creditors of equal priority should receive pro rata shares of the debtor's property. <u>Begier v. I.R.S.</u>, 496 U.S. 53, 58 (1990); Endo Steel, Inc. v. Janas (In re JWJ Contracting Co., Inc.), 371 F.3d 1079, 1081 (9th Cir. 2004) (quoting Danning v. Bozek (In re Bullion Reserve of N. Am., 836 F.2d 1214, 1217 (9th Cir. 1988)). By permitting a bankruptcy trustee to avoid certain preferential payments made by the debtor just prior to filing for bankruptcy, § 547 prevents the debtor from favoring one creditor over others. In this way, Congress attempted to level the playing field for all creditors during a specified period of time prior to bankruptcy, and thus § 547 may be viewed as a protection to creditors. It does not imply that debtor's actions were illegal (continued...)

When bankruptcy trustees enter into settlements or compromises, such agreements are subject to approval by bankruptcy courts following notice and a hearing. See Rule 9019(a); Local R. Bankr. S.D. Cal. 9019-1. Although the bankruptcy court has wide latitude in approving compromise agreements, its discretion is not unlimited. Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1988). Rather, bankruptcy courts may only approve the settlement if it is "fair and equitable" and "reasonable, given the particular circumstances of the case". In re A&C Props., 784 F.2d at 1381. The bankruptcy court should also consider whether the compromise is in the best interests of the estate. CAM/RPC Elecs. v. Robertson (In re MGS Mktq.), 111 B.R. 264, 266-67 (9th Cir. BAP 1990).

In <u>In re A&C Props</u>., the court adopted four factors to aid bankruptcy courts in their determination of the "fairness, reasonableness and adequacy" of proposed settlement agreements:

- (a) the probability of success in the litigation;
- (b) the difficulties, if any, to be encountered in the matter of collection;
- (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and
- (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

⁹(...continued)

or improper, but were merely violative of Congress' bright line timetable for pre-petition payments. Thus, because the payments made to Mr. Schwarz occurred during the relevant reach back period, the Trustee alleged they were preferential, and thereby avoidable as a matter of bankruptcy law, but not necessarily improper or illegal. In fact, outside of bankruptcy, preferring a creditor is not only legal, it is expressly authorized by California law. See CAL. CIV. CODE § 3432.

<u>In re A&C Props.</u>, 784 F.2d at 1381. The trustee bears the burden of proving that the compromise is fair and equitable. Id.

In this case, the bankruptcy court specifically considered each of the <u>In re A&C Props.</u> factors, and concluded that the settlement met that standard. We agree.

A. Success in the Litigation.

Mr. Schwarz contended that payments totaling \$17,500 were salary payments, as opposed to reimbursement of loaned amounts as Schwarz Pub. provided in its Statement of Financial Affairs.

Thus, the very status of the money was in question, and Trustee would have to resolve that issue before the preference action could be decided. This generates a certain amount of uncertainty with regard to Trustee's likelihood of success on the preference action. Accordingly, there was a risk of losing the preference action and success was uncertain.

B. Difficulty of Collection.

This factor is well-documented in the record. Mr. Schwarz filed two affidavits in which he described, under oath, his financial situation. Having lost his job, his wife's salary combined with his unemployment benefits just barely covered their living expenses. He further stated that his home was overencumbered, and thus could provide no equity upon which Trustee could rely for payment of a judgment. He stated that he borrowed the \$7,500 for the settlement payment.

Thus, the record supports the bankruptcy court's finding that, were the Trustee to obtain a judgment, any collection of the judgment amount would present a significant challenge.

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C. Complexity, Expense and Delay.

While it appears that this particular preference action would not be overly complex, it would require a trial. There would also necessarily be a certain amount of discovery and document production that would take place, particularly on he issue of whether the payments were reimbursement or salary.

Taking a preference action to trial would inevitably cost creditors, both in terms of expense and delay. Creditors, of course, wish to receive the maximum payment they are owed in the shortest possible time. Thus, Trustee must strive to arrive at that balance. While he might be able to obtain a judgment from the bankruptcy court for the full \$17,500, it would arrive months later, and after the costs of discovery, trial preparation, and trial had been incurred. Here, Trustee estimates that it would cost \$5,000 - 7,500 to try the preference action.

And even after successfully prosecuting the preference action, all Trustee would have in hand is a paper judgment. Converting that judgment into cash with which to pay creditors, and lawyers, would likely not be easy, given Mr. Schwarz' financial situation, nor would it be instantaneous. It requires time and money to ferret out assets and convert those assets into cash. And from any cash obtained, all approved professional costs would be deducted before creditors were paid.

Finally, while the delay cannot be effectively reduced to a dollar amount, to most creditors a dollar today is worth more than one received next year. This delay must also factor into Trustee's decision to settle.

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D. Interests of Creditors.

Finally, the bankruptcy court is to consider the paramount interests of the creditors. It is a bankruptcy trustee's job to maximize the value of the bankruptcy estate, which in turn maximizes the payment to creditors. A trustee's compensation is a direct reflection of the amount he or she distributes to creditors from the bankruptcy estate. § 326. Thus, there is proper motivation to bring as much into the estate as possible. However, as noted above, all approved expenses incurred are subtracted from the estate before payout, so minimizing expenses is also a valid consideration. Here, Trustee was able to secure a cash settlement totaling approximately 43 percent of the total payments made to Mr. Schwarz, with a minimum of expenses incurred and very little delay.

The Panel finds that the bankruptcy court properly considered the <u>In re A&C Props.</u> factors, and that there is a basis in the record for its finding that the settlement agreement at issue satisfied those factors. Thus, we hold that there was no abuse of discretion and affirm the bankruptcy court's approval of the settlement.¹⁰

various documents from both Schwarz Pub. and Mr. Schwarz.

Joy raises numerous requests for this Court to subpoena

However, such requests need to be raised before the bankruptcy court, as it is the proper finder of fact. King v. Stanton (In re Stanton), 766 F.2d 1283, 1287 (9th Cir. 1985); Dolliver v. United States, 379 F.2d 307, 308 n. 1 (9th Cir. 1967). To the extent Joy may have sought such documentation from the bankruptcy court, she has not raised on appeal any allegation that the bankruptcy court erred in not requiring such production.

Abandonment of Business Records

The Bankruptcy Code allows Trustee to abandon property of the estate that is "burdensome to the estate or that is of inconsequential value and benefit to the estate." § 554(a).

However, the code and rules require notice, a hearing, and an order of the court authorizing the abandonment. § 554; Rule 6007; Pace v. Battley (In re Pace), 146 B.R. 562, 564 (9th Cir. BAP 1992) (citing Hyman v. Plotkin (In re Hyman), 123 B.R. 342, 348 (9th Cir. BAP 1991), aff'd 967 F.2d 1316 (9th Cir. 1992)).

Both the procedural and the substantive requirements of § 554 must be satisfied. Robertson v. Alsberg (In re Alsberg), 161 B.R. 680, 683-84 (9th Cir. BAP 1993) (citing Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 709-10 (9th Cir. 1986)). It appears there were no procedural deficiencies:

Trustee gave notice to the creditors, a hearing was held, and the bankruptcy court entered an order authorizing the abandonment.

"In order to approve a motion to abandon property, the bankruptcy court must find either that (1) the property is burdensome to the estate or (2) of inconsequential value and inconsequential benefit to the estate." Viet Vu v. Kendall (In re Viet Vu), 245 B.R. 644, 647 (9th Cir. BAP 2000) (citing \$ 554(b); Morgan v. K.C. Mach. & Tool Co. (In re K.C. Mach. & Tool Co.), 816 F.2d 238, 245 (6th Cir. 1987)); In re Johnston, 49 F.3d at 540.

On the notice sent to creditors, Trustee indicated his intention to abandon Schwarz Pub.'s business records because they

provided little or no equity for the estate. However, at the hearing on the proposed abandonment, he also indicated that the storage of the business records was costing the estate \$60 per month but that he had made copies of all documents necessary to the administration of the estate. The Trustee also noted that he had not found any evidence of wrongdoing or fraud which would require a forensic examination of the documents. Finally, in her briefing, Joy acknowledged that Trustee made the Schwarz Pub.'s business records available for her to examine, but that she found the costs to do so were significant.

Based on the record, we cannot find that the bankruptcy court abused its discretion in ordering the abandonment. A seasoned Trustee made copies of relevant documents, and deemed the others to be of no import to the administration of the estate. Furthermore, the storage of the documents was diminishing the estate at the rate of \$60 per month. The record supports the abandonment order by the bankruptcy court, and we affirm that order.

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CONCLUSION

We AFFIRM the order of the bankruptcy court granting
Trustee's Settlement of a potential preference action with
Michael J. Schwarz. We also AFFIRM the bankruptcy court's order
allowing the abandonment of Schwarz Pub.'s business records.